INFORMATION

For the Earl of Buchan, *Againſt* *Sir* John Cochran.

THE caſe of the Earl of *Buchans* Suſpenſion hath been ſo fully debated in your Lordſhips preſence, and doth in effect turn upon ſo few and ſo plain points, that the Earls Lawyers are tender to give your Lordſhips any new trouble in this matter.

It is nottour, and Sir *John* himſelf cannot deny it, that Sir *John* being at *London* upon occaſions of his own, in the year 1695. without the leaſt ſuggeſtion or inſinuation from the Earl of *Buchan*, or any of his Friends or Relations, he invites him by moſt kind and and preſſing Letters to come up to *London*, and to look after a Marriage, and getting others of my Lord *Buchans* Friends to joyn with him, my Lord *Buchan* was prevailed with, not from the leaſt view of any ſervices that he expected from Sir *John Cochran*, but principally by what was repreſented by others, and that he perceived Sir *Johns* kindneſs, and good wiſhes did go along with it.

The Earl being thus invited and encouraged by Sir *John*, undertakes that expenſive journey, and for a time had Sir *Johns* countenance, but no otherwayes then he had the countenance and kindneſs of his other Friends, and to whom indeed Sir *John* in this matter was only ſubſervient, but Sir *John* being detained at *London* by his own affairs, much longer than he expected, and having inſinuat upon my Lord *Buchan* to an intire confidence, he importuned his Lordſhip to ſtay beyond his purpoſe, and then pretending to make his good wiſhes more effectual, he tells the Earl that Money and credit were needfull, and thereby elicits from him the firſt Bond of one thouſand pounds *ſterling*, and for the more full diſcovery of this practice and deſigne, your Lordſhips have ſeen how he alſo procured from him a ſecond Bond of a thouſand *Guineas*, ſo that the Earl doth poſitively inform that in this whole matter he never ſuſpected any deſigne in Sir *Johns* management, ſave that he did all in proſecution of his firſt kindneſs, and ſo long as they were in theſe terms he not only did bear Sir *Johns* expences in any little trouble he gave him, but advanced him alſo Money when ever he demanded it, and how ſoon Sir *John* ceaſed to live with him in the terms of Friendſhip, for what reaſons Sir *John* knows beſt; But this is certain, that after that Sir *John* became a plain obſtructer and oppoſer of any Match the Earl intended without him, and as to the happy Marriage that the Earl at length obtained. It is well known, that Sir *John* was his declared enemy, and that the Ladies neareſt Relations having diſcovered a little of his practices, did condemn them with the greateſt indignation.

This being the true account of matters betwixt the Earl and Sir *John*, and of what gave occaſion to the contraverſie now betwixt them, theſe things are moſt certain

certain. 1. That Sir *John* was the firſt and moſt preſſing inviter of the Earl to go for *London*. 2. That when he came there he had no extraordinary ſervice for Sir *John*, but common Friendſhip which was as Friendly entertained. 3. That the Earl not only ſaved Sir *Johns* expences in his affairs all he could but likewayes did advance him Money freely and friendly as he demanded it. 4. That Sir *John* having eſtabliſhed his confidence with the Earl, did elicit Bonds from him at his pleaſure. 5. That no kindneſs or ſervice that ever he pretended for the Earl, did prove effectual; And 6. That in reality, and to the obſervation of all that knew how the Earl and Sir *John* lived at *London*, Sir *John* was never put to any extraordinary expence upon the Earls account, whereby your Lordſhips may plainly perceive how favourable the Earls part is in all this buſineſs

But to the Cauſe it ſelf, your Lordſhips after much debait, did by two ſeveral Interloquitors find the Court of Chancery in *England*, a competent Court, and Judicatory to the Earl and Sir *John* in the action there moved by the Earl againſt him, and this was in effect undenyable, for ſeing that matters of Fact betwixt them had fallen out in *England*, that the Bond was granted there, that they were both reſiding there, that Sir *John* appeared upon Citation, and never offered to decline, that he gave in his defences by way of ſworn declaration after the form of the Court, and laſtly, that thereupon he received an injunction from that Court, there can be nothing more manifeſt, then that he fully owned and eſtabliſhed the Juriſdiction of the Court, and that *lis* was *conteſtata* there betwixt the parties, and that thereby there was a *jus queſitum* by a judicial Contract to the Earl of *Buchan*, that muſt be perpetually binding upon Sir *John*, according to the Laws and rules of that court.

It is true it was alledged, that the Bond was granted in the ſcotch form, with a conſent to regiſtration here, but it is as true, that that conſent was no wiſe excluſive of the Earls Purſuing Sir *John* in the Chancery of *England*, for eliciting ſuch a Bond and his unjuſt pretenſions to it; The Bond having been granted as is ſaid, for Cauſes that were quite out of doors.

After your Lordſhips had found the Juriſdiction competent, yet you thought fit by your laſt Interloquitor to find the decree reviewable, againſt which the Earl did not directly Re-claim, but doth only plead an explication, according to the common Rules of Juſtice and Law of Nations, that the Decree given in the Chancery of *England* betwixt parties that had owned and eſtabliſhed the Juriſdiction in manner foreſaid, might be no otherwiſe, and by no other Law reviewable here, nor it would be in *England*.

Res judicata. Your Lordſhips know perfectly, that the *res judicata* elſs where are perpetually ſuſtained here according to the Laws and rules where they are pronounced, when the Court is competent and the authority thereof acknowledged by both parties, and it is evident, by both the debait and Minuts, that Sir *Johns* Procurators could not deny, but that *res judicatæ* in *France* or *Holland* ought to bind here, and therefore their great pleading was upon pretended ſpecialities, tho in effect there be none in this caſe.

And your Lordſhips have ſo conſtantly obſerved the authority of *Res Judicata* abroad, when orderly proceeded according to the Laws of the place, that you have even given Commiſſions to know *de facto*, what was the Law and Cuſtom of theſe places where Parties differed anent it; nor did your Lordſhips judge it either below you, or without your line to inform your ſelf of this matter, as in any other point of Fact, it being certain, that in caſes of this kind, the queſtion neither is, nor can be what will be judged juſt or unjuſt here according to our Laws and Cuſtoms, but what was *de facto* judged there, where the Parties had Submitted, and the Court was competent according to the Laws and Cuſtom of that place, which is all that the Earl of *Buchan* contends for.

The ſpecialities alledged by Sir *Johns* Procurators were, that the Decree was no final Sentence; that it was but a continuation of the Injunction, that Sir *John* was abſent

abſent at the pronouncing. And laſtly, that Sir *John* according to the Earls conſent to the Regiſtration, had Charged here, and the Earl Suſpended, and your Lordſhips repelled the reaſon of *lis pendens*: and that a Decreet of Suſpenſion was pronounced here, before this Decree appeared from *England*.

To all which it was, and is moſt directly and clearly Anſwered. And 1. That it was a final Sentence, appears by the Decreet it ſelf, whichis not only ſaid to be *finale judicium*, but doth moſt expreſly after ſworn Defences and the Examination of other Witneſſes, proceed to reduce and reſcind the Bond, and that for a clear *Becauſe, viz.* That there was no valuable Cauſe for it, and ordains the Bond to be cancelled, and the Injunction of not Execution to be perpetual, which in our Terms, is exactly to reduce *parte comparente*, and to ſuſpend the Letters ſimpliciter. 2. Sir *John* was not abſent in all the Proceſs as is manifeſt by his Compearing, and giving in his ſworn Declaration; but the only abſence marked is, that he had not Compeared upon the particular Citation given him according to the form of that Court, *ad audiendam ſententiam*, which ſignifies nothing. 3. As to the Earls conſent to the Regiſtration, and what followed upon it in *Scotland*, there could be nothing more plainly redargued, for it being undenyable, that a perſon conſenting to a Juriſdiction, and entring into a judicial Contract by *Litiſconteſtation*, binds himſelf ſo, both to that Court and to the other Partie, that he can thereafter innovat nothing to fruſtrate Sentence; it follows by plain demonſtration, that all that Sir *John* did in *Scotland*, after he had given in his ſworn Declaration, and received the Courts Injunction, was unlawful and reprobat, and never be objected againſt the Decree of Chancery, to which he ſo clearly ſubmitted.

It was ſaid, that the Bond was firſt Regiſtrat in *Scotland*, but that is falſe, as appears by the Dates; It was alſo ſaid, That the Earl ſuſpended here. But 1. His ſuſpending was neceſſarie Defence. 2. His reaſon of Suſpenſion was the very *lis pendens*, but it was. 3. Alledged, that the *lis pendens* was repelled, and if the *litis pendentia* was over-ruled or rejected, neither the competency of the Juriſdiction nor the Decree of the Court could ſignifie any thing: but it was as plainly Anſwered, that *lis pendens* was at firſt rejected, becauſe not ſufficiently inſtructed, and ſpecially becauſe the Judgment and Decree was not then produced.

But, 2. Since the Suſpenſion is yet open, and no Decreet of Suſpenſion Extracted it is evident, that the Earls reaſon of *lis pendens*, as well as all his other reaſons, muſt yet be held to be undiſcuſſed.

But, 3. Before any Decreet of Suſpenſion Extracted before your Lordſhips, the Earl produces the foreſaid final Decree moſt lawfully recovered, as ſaid is.

There were many other By alledgeances made for the Charger, ſuch as, That your Lordſhips Decreet of Regiſtration firſt pronounced in *Scotland*, ſhould overrule the Earls poſterior Decreet in *England*, to ſtop his Procedure there: but to this it was fully Anſwered, that the Decreet of Regiſtration, and all that followed upon it, was an unlawful Innovation, againſt the rule of common Juſtice upon the Chargers part, and therefore not to be regarded.

2. It was alledged, that in *England* our Decreets are not reſpected, but that was denyed; and it is moſt certain, that tho ſometimes they have doubted the verity of our Decreets, becauſe not atteſted by Seals in their manner, until they were better Informed, yet they never refuſed their Authority.

But the Sum of all is, That the Earl only contends, that his Decreet of the Chancery may have that Authority here, that is eſtabliſhed by the Law of Nations, and that if your Lordſhips ſtill find it Reviewable, you may declare it to be Reviewable, only according to the Laws and Cuſtoms of the Court where it was pronounced, which being moſt juſt and equitable, it is hoped your Lordſhips will alſo remember that this caſe is ſo favourable upon the Earl of *Buchans* part, that if it were needfull as is not, *Rapienda eſſet occaſio.*

In Reſpect whereof &c.

Note of ſome Deciſions and Cuſtoms to which the preceeding Informati-on does relate

IT appears by the Information, that a Sentence pronounced abroad is in the *ſame* or *Stronger* caſe with a *Writ* granted there, for the Reaſons beſore adduced. But a *French* Bond was ſuſtained tho' it wanted Writers name and Witneſſes ; and albeit the Subſcription was denyed. The ſame in an Aſſignation made in *Germany*. *And a Defence competent* in England, was ſuſtained againſt a Write which was to receive *Execution in Scotland* 11 of *December* 1627. *Falconer* contra the Heir of *Beatie*, 27. of *July* 1633 *Gordon* contra *Morlie*, 15. of *Febrnary* 1630. *Hopkirk* contra *Jaffrey*.

But farder, the Lords have ſuſtained an confirmation of an Executor made in *England*, tho there was no ſpecial Inventar given up, nor any particular, *mention* of the Debt acclaimed in the *Defuncts* Teſtament : Albeit ſuch a confirmation be null by the Law of *Scotland*, The Executor always proving that to be the form of *England*, *Feb.* 16. 1627. *Lawſon* contra *Kello*, which is the more conſiderable in the preſent caſe, that Confirmation or Publication of a Teſtament, *is a Judicial Act*; and yet ſuch ane judicial Act as is exped without the *Conſent* or *ſpecial Citation* of other Parties having Intereſt : Notwithſtanding whereof the Lords ſuſtained the Law of the Place to be its Rule as to its Subſiſtence.

But yet further : There is a Tract of Deciſions ſuſtaining the Defence of of *res judicata* in *Ireland*, even where the Writes were alledged to be forged in *Scotland*, without any reply upon the Judgements not being valuable here, or being re-viewable according to the Laws of this Kingdom, 6th. *Feb.* 1672 Sir *Robert Murray* contra *Murray* of *Brughtoun* 26. of *June* 1673. *inter eoſdem* Where it is obſervable, that if any ſuch reply had been imaginable, it had not been forgote by ſuch *Lawyers* as were then on the Stage. So in the caſe betwixt Sir *Alexander Hope* and Sir *William Binning* anent the Succeſſion of Collonel *Gordon*, the Defence of *res Judicata* was ſuſtained, a day aſſigned, and and ane Act extracted for proving thereof.

This is no more then what is the univerſal Practice of Europe, even when a *Superior Judge* cognoſces upon the Sentence of an *Inferior* Bench. So in *France* where the preſidial Sentences comes up to the Parliament of *Paris*, they are determined according to the Laws of the Province where they were pronounced. even tho one or both of the Litigants were *Pariſians*. The ſupream Court of *Holland* make their revieus conform to the Statutes of the particular Tovvns, vvhence the queſtioned Sentence had its riſe. It is the ſame thing in the *Imperial* Chamber of *Spire* : And the Court of *Melchin* deviats not frem the ſame Rules of common Senſe : As no doubt an inferior Sentence conform to the Udal-Right would be ſuſtained with us. Much more when

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the Judicatories are *Co-ordinat* and otherwise, it would not be a review, in the second *instance*, of *res Judicata*, but without *any respect* thereunto, a cognition as it were in the *first*.

There can remain no difficulty in the Lords getting notice of the *English* Law and forms relative to this case, for.

1. Its presumed for the Decree, it being of a Soveraign Court, that it is irrevisable by any Judicatur but the Parliament iu *England* : Because by the nature of the thing (*& quod ineſſe debet in eſſe preſumitur*) the Chancellour is *functus* and cannot revise his own Decreet upon Iniquity, nor consequently can our Lords of Session do it *cum par in parem non habet imperium*, unless in so far as Sir *John Cochran* (against whom the Presumption stands) shall offer to prove that is reviseable and ought to be Corrected in *England*; which will be easily cleared by ane Act, Commission and Report.

2. This is no ways forraign to our constitution : but on the contrary, there is a Tract of Custom of Issuing out of such Commissions. So in the former cases of the Bond made in *France*, the Assignation made in *Germany*, and the Defence that was alledged to be competent in *England*. To which shal be only added two others, *viz.* *February* 17. 1627. *Lawson* contra *Kello*, and *January* 16. 1676. *Cunninghame* contra *Brown* : in the first whereof Commission was granted for proving the custom of *England* anent the formalities of *a judicial act*, the Confirmation of a Testament; and in the second, Commission was granted to the Judges of the Common Pleas to declare what was their Law, in the case of an *extrajudicial* Writ, For as my Lord *Stair lib.* 1. *Tit.* 1. *N.* 16. observes the Law of *England*, and other Forreign Nations being matter of fact to us, is probable by the declaration of the Judges of the place.

There is a rule *L.* 30. *ff. de judiciis ubi acceptum eſt ſemel judicium ibi, & finem accipere debet.*

Yet if Sir *John* had charged the Earl in *Scotland*, and the Earl had repeated a Reduction upon reasons which require *Terms*, and a *Course* of Probation, such as *Circumvention*, &c. Though this would have been relevant, yet it would not have been found *Competent* by way of Suspension or Exception, as it is expresly pled for Sir *John* in the Minuts, 20 of *Jan.* 1697. And therefore the Letters would have been found orderly proceeded, reserving Reduction as accords. For Regiſtrat Bonds having *paratam executionem* are not to be stopped by any other reasons of Reduction, repeated *incidenter*, then those that are *instantly verified*, or are not *altioris indaginis*, others being presumed *animo protelandi*. But if before Extracting this Decreet of Suspension it did happen that the Earls Reduction came up the length of obtaining a Decreet therein : on a second calling or a Bill, the Decreet of Suspension would be stopped, and the Decreet of Reduction received, thongh *lis pendens* was repelled.

So in our Law, if two Citizens living for the Summer time in their Country-Houses, *Titius* should pursue *Mevius* before the Sheriff, for annulling a Bargain of Moveables ; and to *prevent the effect* of this Process *Mevius* should pursue *Titius* before the Baillies of his own Town for implement. The Sheriffs Decreet is not only *first* pursued for, but also first Extracted : and *Meviuses* Process was a fraudulent *Anticipation*, which being a *wrong* had in Law no Warrand, and consequently there is no doubt which of these Co-ordinat De-

Decreets would be preferred by the Lords: and two Co-ordinat Judicatories under the same Prince, though in different Kingdoms, are *quoad* the *rationale* in the paralel State.

As the Chancellary is *a Court of Judgment*, having rules and practique like the *Pretorian Power*; So *conditions sine causa*, or *causa data causa non secuta*, are well known even in our Law: The Lords do regulat Bonds bearing borrowed Money (when they are proven not to be truly such) according to their *Cause*; Particularly in the Year 168 Colonel *Patrick Hay Having* granted a Bond of 800 *lib. Sterl.* to the Earl of *Kelly*, Lord *Sinclare*, and Sir *James Turner*, and they pursuing the Collonels Daughters thereupon: It was answered, that the Bond was granted for expected Services at Court in recovery of a great Sum of Mony from the Senat of *Hamburg*, which were never perfectly done, To which it being replyed, and Sir *James* having Deponed upon many particular instances, as also that he & the other two had stayed a considerable time at *London* only for attendance of that affair: The Lords notwithstanding thereof would not sustain the Bond in its extent, but in respect the same Money was thereafter *actually* recovered, and the Chargers Soliciting might have promoved it) modified the 800 *lib. Sterl.* & Annualrents to simple 3000. Merks *Scots* ane Charge of which Decreet is presently depending before the Lords. But Sir *John* is not in the case even of a Modification, since he has not only received 200. *lib. Ster.* already, but likevvise he vvas rather ane Obstruction then a Promoter of the Earls Match.